BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

In the Matter of	)	
	)	IB Docket No. 96-111
Amendment of the Commission's Regulatory Policies to Allow Non-U.S.-Licensed Space Stations to Provide Domestic and International Satellite Services In the United States	)	
	)	
Amendment of Section 25.131 of the Commission's Rules and Regulations to Eliminate the Licensing Requirement for Certain International Receive-Only Earth Stations	)	CC Docket No. 93-23 RM-7931
	)	
COMMUNICATIONS SATELLITE CORPORATION Request for Waiver of Section 25.131(j)(1) of the Commission's Rules as it Applies to Services Provided via the Intelsat K Satellite	)	File No. ISP-92-007

To: The Commission

COMMENTS OF COLUMBIA COMMUNICATIONS CORPORATION

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COMMENTS OF COLUMBIA COMMUNICATIONS CORPORATION

Columbia Communications Corporation ("Columbia"), by counsel and pursuant to Sections 1.415 and 1.419 of the Commission's Rules, hereby comments on the Commission's Notice of Proposed Rule Making ("NPRM") in the above-captioned proceeding. Columbia welcomes the Commission's decision to initiate a

comprehensive rulemaking to address competitive opportunities in the satellite industry, but notes that serious Commission examination of the problem of closed foreign markets is overdue.

In the absence of clear policy guidelines for considering access to the U.S. market by foreign-licensed satellite systems, Columbia was compelled during the period from early-1994 to mid-1995 to oppose a number of individual Earth station applications that sought access to non-U.S. satellite systems licensed by countries where there were and are substantial *de facto* barriers to entry by foreign-licensed satellite systems. Columbia took these actions in order to focus the FCC's attention on the significant difficulties posed by these barriers for U.S. satellite operators.

Unfortunately, rather than fully examining the significant issues raised by these oppositions, or awaiting necessary guidance from the Commission on the complex issues surrounding market entry, the FCC's International Bureau granted the applications that Columbia opposed, dismissing its objections in cursory fashion. Although these decisions paid lip service to the type of analysis that the Commission now proposes to apply to Earth station applications seeking access to non-U.S.-licensed satellite systems, the orders did not come to grips with the complexities involved in opening many foreign markets to fair and open competition. Columbia is hopeful that the instant rulemaking will result in the adoption of clearer, more rigorous guidelines.

I. OVERVIEW AND SUMMARY

Columbia endorses in principle the basic rulemaking proposal advanced by the Commission to undertake examination of the competitive opportunities available to U.S. satellite operators in foreign markets as an integral part of the processing of Title III Earth station applications that seek to access the capacity of non-U.S.-licensed satellite systems. It would be both unnecessary and counterproductive for the Commission to seek to relicense non-U.S. systems for use in the U.S. market. Such a step would unreasonably complicate the U.S. regulatory process while, at the same time, it would encourage foreign administrations to impose additional burdens on U.S. satellite systems seeking access to overseas markets.

Given the importance of securing effective competitive opportunities abroad, however, the Commission should immediately apply its ECO-Sat test to all pending Earth station applications proposing use of non-U.S. satellite capacity. The Commission has made clear since the initial Notice of Proposed Rule Making in this proceeding, issued in April 1995, that a refinement of its approach to market entry by non-U.S. satellites was under consideration. Thus, all applicants since that time have been aware of possible expanded application requirements. Moreover, the process

proposed by the Commission merely refines and clarifies general principles that were already considered relevant in evaluating applications to access non-U.S. satellites.

Although Columbia generally agrees with the Commission's determination to evaluate both "home" and "route" markets as part of its ECO-Sat analysis, it believes that the Commission should retain flexibility in its standard to adapt to changes in both satellite system architecture and market conditions. In general, the FCC's inquiry should examine all foreign route markets that an applicant proposes to serve. Nonetheless, whether this analysis is purely on a route-by-route basis or allows service generally based on the demonstration of a "critical mass" of open markets, acceptability of the application should be determined based on the specific type of service proposed.

It is particularly important that the Commission require each applicant to demonstrate fully the availability of effective competitive opportunities in the relevant markets to be served. Applicants should have the burden of showing not only that no law or official policy impedes entry by U.S.-licensed systems, but also that the actual procedures employed are fair and transparent and do not impose *de facto* barriers to service by U.S. operators. Because this burden is appropriately placed on the Earth station applicant, no useful purpose would be served by imposing arbitrary reporting requirements on U.S. licensees concerning the markets in which they offer service. Applicants will be able to rely on both their own knowledge of the markets they seek to

serve and upon any prior FCC decisions concerning applications to serve these markets as a basis for their showings.

Finally, the special status of intergovernmental organizations such as Intelsat and Inmarsat justifies specialized treatment of these entities with respect to any proposal to offer U.S. domestic service or to spin-off or privatize a portion of their assets. In the first instance, because of the privileges and immunities afforded the IGOs and the defined public interest purpose which they were originally created to serve, Columbia believes that it would be inappropriate to permit this capacity to be converted to serve U.S. domestic routes absent a restructuring of both Intelsat and Inmarsat. Second, even after restructuring, because of the historic market dominance of the IGOs and their ties to monopoly service providers in many countries, the Commission should apply a stringent "critical mass" test to any IGO progeny. Specifically, any system that is formed as a spin-off of an IGO or otherwise would use IGO assets should be permitted to provide service in the U.S. market only if U.S.-licensed systems have access to at least 80 percent of the total population of the nations represented by entities investing directly or indirectly in the IGO spin-off.

II. DISCUSSION

A. Procedural Framework For Authorization of Non-U.S. Satellites To Serve the U.S. Market.

Columbia strongly supports the Commission's determination that it must establish a defined mechanism by which to consider whether to allow non-U.S.-licensed space stations and satellite systems to gain access to the U.S. market. Conditioning U.S. market entry for such systems upon effective opportunities in the home and route markets that the non-U.S. system would serve is not only appropriate, but is necessary in order to extend fully to the satellite industry the equitable principles embodied in the Commission's Order adopting rules for foreign-affiliated carriers.[1/] Although adherence to these principles may, in the short term, prevent some foreign systems from establishing service to and from the U.S., it should promote unfettered global satellite competition in the long run.

As the Commission concludes in the NPRM, however, the pro-competitive purpose of adopting an 'effective competitive opportunities" test for satellite services ("ECO-Sat") would not be advanced by requiring full-scale U.S. relicensing of foreign systems as a condition of entry.[2/] The Commission need concern itself only with the

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1/ *See* Market Entry and Regulation of Foreign-Affiliated Entities, 11 FCC Rcd 3873, 3881 (¶¶ 19 *et seq.)* (1995) ("Foreign Carrier Entry Order").

2/ *See* NPRM, FCC 96-219, slip op. at 8-9 (¶ 14)

discrete issues of entry opportunities in the relevant home and route markets to be served using a particular system, and with the particular technical parameters affecting compatibility with International Telecommunications Union ("ITU") regulations, existing U.S.-licensed systems and other domestic spectrum uses. Given this relatively narrow range of issues, it is reasonable for the Commission simply to incorporate these matters into its consideration of Earth station applications that seek to access non-U.S.-licensed space segment capacity. Such applications are already required under the Commission's rules, so that this regulatory change will simply require such applicants to submit additional information.

Conversely, full relicensing of foreign systems within the U.S. would be both unnecessary and counterproductive. Once a satellite has been licensed by one administration and coordinated through the procedures established by the ITU, it has established a basis for international operation. For this reason, there is no need for the FCC to make separate provision for consideration of foreign satellite systems within a U.S. processing round, as the Commission suggests elsewhere.[3/] Requiring non-U.S. satellites to file applications as part of the U.S. licensing process in order to access

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3/ *See* id. at 9-10 (¶ 16).

spectrum would be fundamentally inconsistent the Commission's initial determination not to relicense space segment, and this notion should be abandoned.[4/]

Globally, relicensing would be counterproductive to the goal of relaxing foreign entry barriers to U.S. satellite systems. As the Commission itself notes, foreign administrations "understandably expect the United States to accept the sufficiency of our procedures abroad — as we expect them to accept the sufficiency of our procedures."[5/] Establishment of any sort of redundant licensing process within the U.S. would undermine this expectation and unreasonably confuse the prospects for U.S. companies seeking to serve foreign markets by encouraging foreign administrations to adopt similar unnecessary procedures. The proliferation of such requirements around the world could substantially and unnecessarily raise the costs of doing business for satellite system operators, and result in increased prices for space segment users. The United States should set an example for the rest of the world to follow by eschewing the imposition of unneeded licensing burdens on non-U.S. system operators seeking access to this market.

4/ Of course, nothing would preclude a non-U.S. entity from seeking a U.S. license for a system already licensed by another administration.

5/ NPRM, FCC 96-210, slip op. at 9 (¶ 14).

B. Application of the ECO-Sat Test and Other Factors.

1. The Commission Should Apply Its ECO-Sat Test To All Pending Applications To Access Non-U.S. Satellites Submitted After The Date Of The Commission's Initial NPRM.

As noted above, the modification of the Commission's application processes that is proposed logically necessitates the submission of only a modest amount of additional information as part of an Earth station application. The submission of this information should not pose a great burden to the applicant — which is, in any case, seeking a valuable authorization for which it must be required to make a full public interest showing. The Commission has already identified in the NPRM important reasons for requiring a demonstration that effective competitive opportunities are available on the principal routes to be served from any U.S. earth station proposed for use with non-U.S. satellites.

Accordingly, Columbia disagrees with the Commission's preliminary determination to apply its ECO-Sat standard only prospectively, to applications filed on or after the date of adoption of the DISCO II NPRM.[6/] Instead, the Commission should apply the test to all pending applications filed after the release of the Commission's initial

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6/ *See* id. at 10 (¶ 20).

DISCO NPRM, in which the issue of establishing clearer guidelines for access by foreign satellite systems was first posed in the context of a rulemaking proceeding.[7/]

The ECO-Sat test is not an entirely new concept, but would simply extend and strengthen basic principles that the FCC has previously identified as relevant in evaluating Title III applications that would permit non-U.S. satellite operators to serve the U.S. market.[8/] The Commission made clear from the adoption of its initial DISCO I NPRM that it was contemplating improvements in its approach, so that all entities filing applications since the release of the DISCO I NPRM have been on notice of potential changes.[9/]

In addition, the November 1995 Foreign Carrier Entry Order reiterated the Commission's intention to consider adopting a clearer test with respect to market entry by foreign satellite systems, and specifically noted that the DISCO proceedings would address this issue.[10/] The substantial public benefits identified by the Commission — "effective competition, open satellite communications markets, . . . responsible spectrum

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7/ *See* Amendment of the Commission's Regulatory Policies Governing Domestic-Fixed Satellites and Separate International Satellite Systems, 10 FCC Rcd 7789, 7797 (¶ 39) (1995)("DISCO I NPRM") ("We invite comment . . . on whether, and under what conditions, non-U.S. satellites should be permitted to serve the U.S. domestic market.

8/ *See* IDB Worldcom Services, 10 FCC Rcd 7278 (Int'l Bur. 1995); Vision Accomplished, Inc., 11 FCC Rcd 3716 (Int'l Bur. 1995)

9/ *See* DISCO I NPRM, 10 FCC Rcd at 7797 (¶ 39).

10/ *See* Foreign Carrier Entry Order, 11 FCC Rcd at 3940 (¶ 176).

management, and [avoiding] the dangers of market distortions"[11/] — clearly outweigh the mere ministerial burden on applicants to amend or modify their applications. Having determined that achieving these goals is in the public interest, the Commission should not hesitate to apply its proposed standards to all applications filed since April 25, 1995. The negative impact on the public interest of failing to apply the new standard outweighs any inconvenience to the applicants.

2. **Identifying the Appropriate National Market For Comparison.**

Columbia agrees that the Commission should employ a threshold test for Earth station applicants based on effective competitive opportunities in the market where the satellite system to be accessed is licensed, *i.e.*, the "home" market.[12/] As the Commission points out, a country that is engaged in the process of licensing a satellite system will very likely have multiple points of nexus with the system: (1) "in most cases the licensing administration will lie within the footprint of the non-U.S. satellite for which U.S. market access is sought"[13/]; (2) "it is almost always true that the licensing administration has the most direct economic ties to the system in question,"[14/] and (3) "there is a direct connection between a satellite's coverage area and the difficulties of

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11/ *See* NPRM, FCC 96-210, slip op. at 8 (¶ 12)

12/ *See* id. at 11 (¶ 22).

13/ Id. at 11 (¶ 23).

14/ Id. at 11 (¶ 24).

coordinating the satellite internationally."[15/] For each of these reasons, the licensing administration (and/or the administration submitting notification information to the ITU) should be considered the system's "home market," and this market must be deemed to provide effective competitive opportunities for U.S. systems as a prerequisite to licensing of Earth stations to access systems licensed by or coordinated through this administration.

Columbia also agrees with the Commission's determination that looking to the home market(s) alone is not sufficient to address all potential market distortions that may occur due to trade barriers.[16/] In order to promote parity among satellite systems serving the U.S. market, the Commission should authorize service on each satellite to each individual destination market only upon a showing that each of these "route" markets is open for service to and from the U S As proposed, this inquiry should examine all foreign route markets to and from which the Earth station applicant seeks to provide service, and should not focus solely on those where a non-U.S. system possesses market power.[17/]

In short, Columbia endorses the Commission's proposal for a two-pronged test that applies the ECO-Sat standard both to the home market or markets of the system

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15/ Id. at 12 (¶ 25).

16/ *See* id. at 12 (¶ 26).

17/ *See* id. at 13 (¶¶ 29 & 30).

to be accessed and to all of the route markets that would be served from the applicant's proposed U.S. Earth station.[18/] Nonetheless, despite the general appropriateness of this "home/route" market test for fixed satellite systems offering point-to-pont services, Columbia cautions — as it does with respect to the categories of service discussed below — that the Commission should adopt a flexible approach that anticipates differing types of satellite service offerings and changing market considerations. Some types of service clearly will not be suited to use of a route-by-route approach, and the Commission should take this fact into account in evaluating applications.

3. Establishment of Service Categories.

Columbia concurs that the ECO-Sat test should be applied on a service-by-service basis, looking to the treatment of the specific service that the applicant proposes to offer.[19/] The Commission clearly should not limit its inquiry to the general permissibility of fixed or mobile service on the relevant routes, but should instead examine specifically whether effective opportunities exist for the actual types of services that the applicant proposes to offer — *e.g.*, video, voice or data. Further, the Commission should take into account whether an advantage in a closed sector of the market could be

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18/ *See* id. at 14 (¶ 32).

19/ *See* id. at 14 (¶ 33).

used by an existing operator to gain advantage in sectors that appear otherwise to be open and competitive.

Moreover, tests developed for FSS or MSS systems should not be applied rigidly. As the Commission acknowledges in the NPRM, satellite technology continues to evolve, presenting a multitude of new approaches and applications.[20/] Thus, as new services are proposed, the appropriate test to be used may be governed not just by whether the system will serve fixed or mobile users but, to an equal or greater extent, by whether the system employs geostationary or non-geostationary satellites, or whether it targets global or regional markets. Given the changing nature of satellite services, the applicant should be given the flexibility in the first instance to demonstrate, for example, that a "critical mass" test is more appropriate for its type of system than a "route market" test. On the other hand, any petitioners opposing such an application should be afforded the opportunity to rebut the applicant's demonstration, with the FCC making the final determination of which standard is appropriate under the circumstances.

20/ Specifically, the Commission recognizes that "available types of satellite services continue to multiply, and any lines of demarcation between service categories may be inherently both provisional and uncertain." *See* NPRM, FCC 96-210, slip op. at 14 (¶ 34).

4. Elements of the Test.

a. **Each Earth Station Applicant Should Bear The Burden Of Affirmatively Demonstrating The Absence Of Both *De Jure* And Specified *De Facto* Barriers In The Markets It Proposes To Serve.**

It is appropriate for the Commission to place the burden upon applicants to access foreign spacecraft to demonstrate that there are no obstacles to provision of service in the home market of the foreign satellite system. While submission of copies of laws or regulations clearly establishing an opportunity for market entry by foreign-licensed systems should create a rebuttable presumption that there are no official statutory barriers to entry, Columbia does not believe that the applicant should be relieved from making at least a preliminary showing with respect to *de facto* market barriers as well.[21/] Investigating and certifying that the particular barriers enumerated by the Commission are not present is clearly within the capability of the applicant as an initial threshold showing. Accordingly, Columbia urges the Commission to require as part of each Earth station application to which the ECO-Sat test applies a showing that the markets to be served have a transparent regulatory framework, that the regulatory body is separate from any competing satellite provider (or that fundamental safeguards are in place to prevent

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21/ The Commission identifies a number of relevant factors that should be examined to evaluate the existence of *de facto* barriers. *See* NPRM, FCC 96-210, slip op. at 16 (¶ 41).

favoritism), and that access to Earth station facilities within the market is not restricted to an incumbent provider.

Moreover, the Commission should establish a careful and thorough approach to evaluating the existence of all barriers to entry that may exist outside of statutes, regulations, and formal declarations of policy. At a time when general global trends are toward deregulation and relaxation of long-standing *de jure* barriers, it is likely that the FCC will be increasingly faced with more complicated and less obvious — but no less real — *de facto* barriers. The mere fact that a country professes openness by statute does not demonstrate that it actually applies its laws without bias. For example, the FCC might, in the abstract, view the actual operation of a U.S. company in a foreign market as a positive indicator of the absence of *de facto* obstacles to entry by U.S. companies, yet such a company's presence in the market might well be based on its navigation of or benefit from unseen barriers to operation.[22/] If transparent regulatory procedures do not exist in a relevant market, this should weigh heavily against satisfaction of the ECO-Sat test, regardless of whether U.S. companies are providing service. In addition, the FCC

22/ *See, e.g.*, "The Greased Palm Issue," The Washington Post, June 1, 1996, at A14 ("In developing countries, as in Russia and other transitional economies, corruption threatens to swallow whole nations, destroying all faith in democracy and making saps of anyone who behaves honestly. It discourages investment and ensures that such investment as appears benefits only the meritless elite while leaving populations impoverished.")

should take special care to ensure that foreign licensing bodies do not arbitrarily or selectively impose unreasonable technical or regulatory burdens upon some applicants.

b. No Reporting Requirements Should Be Imposed On U.S. Licensees.

Because the burden of presenting evidence that entry barriers are not present in a particular market is appropriately placed on the applicant, no purpose would be served in requiring U.S. licensees to file annual reports listing the markets where they provide service.[23/] As described above, applicants can rely in the first instance on market-knowledge gained from the operators of the systems they propose to access — as well as upon Commission precedent — for the purpose of demonstrating the absence of both *de jure* and *de facto* barriers. Moreover, U.S. systems may have access to particular markets for only limited services, and it would be necessary for the Commission ultimately to analyze such distinctions with respect to particular service proposals unless it established exacting standardized reporting requirements. Columbia believes that careful analysis of competitive opportunities is better accomplished in the context of individual applications, where both the applicant and any interested parties will have an opportunity to present relevant information. Annual reporting requirements for U.S. licensees would simply pose an unnecessary regulatory burden, which would be fundamentally inconsistent with the deregulatory approach that the FCC is pursuing in other areas.

23/ *See* NPRM, FCC 96-210, slip op. at 15-16 (¶ 39).

5. Other Public Interest Factors.

In addition to applying the version of the ECO-Sat test that is appropriate under the circumstances of each application, the FCC should consider other relevant public interest factors, including the overall significance of the operation proposed in facilitating enhanced competition in the U.S. satellite market and promoting greater global competition, as well as any national security, law enforcement, policy or trade issues that may be raised by the appropriate departments of the Executive Branch.[24/] As part of this necessary analysis, the Commission should focus particularly on the extent to which the relevant foreign administrations have been good faith negotiators in coordinating spectrum use with U.S.-licensed satellite systems.[25/]

6. The Commission Should Establish Appropriate Enforcement Mechanisms To Ensure Full Post-Grant Compliance With Its ECO-Sat Policy.

One matter that is not addressed in the Commission's NPRM is the need for vigilant enforcement of market access following the grant of Earth station applications. Enforcement mechanisms are necessary to ensure that Earth station licensees do not use their access to non-U.S. capacity to provide service to markets where they have not been authorized to provide service or where new or previously unrecognized entry barriers

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24/ *See* NPRM, FCC 96-210, slip op. at 18 (¶ 48).

25/ *See* id.

have prevented operation by U.S.-licensed satellite operators. The Commission should therefore establish procedures to revoke expeditiously the authorizations of Earth station licensees that use their facilities to communicate with non-U.S. space segment facilities that they have not been properly authorized to access or to revoke authorizations in part where particular countries prove to be obstructing actual service by U.S. satellite operators.

C. Technical and Legal Requirements

1. Technical

All Earth station applicants should be required to comply with applicable ITU Radio Regulations and to meet U.S. technical requirements with respect to ground facilities, including restrictions on the size of transmit/receive Earth stations[26/] and e.i.r.p. limitations on transmissions to and from satellites.[27/] The Commission should not attempt, however, to impose its technical rules upon space station applicants by requiring technical demonstrations concerning the satellites themselves — such matters should be left to the ITU.[28/]

26/ *See* NPRM, FCC 96-210, slip op. at 19 (¶ 55).

27/ *See* id. at 20 (¶ 56).

28/ *See* id. at 21-22 (¶ 61).

2. Foreign Ownership

Columbia supports the Commission's determination to consider foreign ownership under Section 310 of the Act only of the Title III Earth station applicant, and not to evaluate separately the ownership of the non-U.S. satellite to be accessed as a licensing issue.[29/]

3. Revised Earth Station Application Form

Given the proposed changes in the basic requirements for Earth station applicants that seek to access foreign capacity, there will be a need for the Commission to adopt minor changes to its existing application form. Earth station applicants seeking to access non-U.S. space segment should require the following additional information as part of a revised Earth station application form (Form 493 or its successor):[30/]

> (1) the specific types of service to be offered;
>
> (2) the country in which the satellite is licensed;
>
> (3) the countries to which service is expected to be offered (*i.e.*, origination and termination of signals);
>
> (4) the basic ownership structure of the satellite system;
>
> (5) a demonstration that there are no legal barriers to entry by U.S. satellite companies in the system's home and route markets; and
>
> (6) information demonstrating the applicant's compliance with applicable Earth station technical regulations.

29/ *See* id. at 20-21 (¶¶ 58-59).

30/ *See* id. at 21 (¶ 60).

Contrary to the proposal in the NPRM, the Commission should not require Title III applicants to submit any additional information concerning the satellite system's compliance with the FCC's legal, technical and financial qualifications.[31/] The legal and financial information is not relevant to an Earth station application, and conflicts with the Commission's sound determination not to relicense space segment for use within the U.S. Technical compatibility issues are best dealt with through the ITU's processes and by requiring that Earth station applicants comply fully with U.S. technical rules and all applicable ITU Radio Regulations. Establishment of unnecessary and burdensome requirements for foreign satellite systems seeking to access the U.S. would be likely to prompt other countries to impose similar unnecessary and burdensome requirements, thereby impeding the Commission's overarching goal of promoting enhanced competition.

D. Treatment of Intergovernmental Organizations (IGOs).

As Columbia has noted in prior comments in this proceeding, any proposal to use capacity controlled by the International Telecommunications Satellite Organization ("Intelsat") or by the International Maritime Satellite Organization ("Inmarsat") is necessarily impacted by ongoing discussions concerning the appropriate future role for

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31/ *See* id. at 21-22 (¶ 61).

these inter-governmental organizations ("IGOs"). The U.S. Government has recommended that Intelsat and Inmarsat be privatized, with the corollary elimination of their special privileges — including favored access to orbital locations, and the legal immunities from which they now benefit. However, it is currently unclear whether this transition will occur and, if it does take place, exactly how it will be implemented. In the absence of final decisions concerning the privatization of the IGOs, Columbia continues to believe that it would be inappropriate to permit the use of Intelsat or Inmarsat facilities for domestic service under any circumstances. As the Commission notes in the NPRM, the IGOs possess unique market power in the international satellite marketplace.[32/] If allowed to extend service into the U.S. market, these systems could exploit their leverage in ways that would distort competition.

In the event that an acceptable plan for IGO privatization is ultimately adopted, Columbia believes that Commission should use a form of "critical mass" test to evaluate applications to access satellites operated by privatized entities "spun off" from the IGOs.[33/] As the Commission notes, regardless of the mechanism used to privatize IGO assets, these companies will retain their "treaty-based heritage" and "may continue to have at least some governmental ownership" in spite of their nominally "private"

32/ *See* NPRM, FCC 96-210, slip op. at 13 & 22 (¶¶ 29 & 62).

33/ *See* id. at 23 (¶ 66).